IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, [illegible]

No. [illegible]

[illegible] Buck, [illegible], *Appellant*,

v.

[illegible], Director of Public Works of the State of Washington, *Appellee*.

Brief and Argument of Appellee

John H. [illegible],
[illegible]

[illegible]
[illegible]

[illegible]

[illegible]

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v.

E. V. KUYKENDALL, Director of Public Works of the State of Washington, *Appellee.*

Brief and Argument of Appellee

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SUBJECT-INDEX.

CASES CITED.

AUTHORITIES CITED.

STATUTES CITED.

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STATEMENT.

This appeal involves the constitutionality of the auto transportation act of the state of Washington, being chapter 111, laws of 1921, with particular reference to the provisions of section 4 of said act relative to the issuance of certificates of convenience and necessity. The appellant in his brief has set forth the issues as made by the amended complaint and it is unnecessary to further summarize the

pleadings at this time. We desire, however, to give a chronological statement of the proceedings.

Under date of October 10, 1922, the appellant made application to the department of public works of Washington for a certificate of convenience and necessity for the operation of an auto stage line from Seattle, Washington, to Portland, Oregon. A hearing was had on this application before the department on March 29th, 1923, and on June 23, 1923, the findings and order of the department were made. The order of the department is printed in the 1923 Annual Report of the department at page 116, and in P. U. R. 1923E, 737. On October 31, 1923, the appellant filed his complaint in the District court seeking to enjoin the appellee from enforcing the said order. (Tr. p. 16). A hearing was had before the statutory court under section 266 of the judicial code and appellant's application for a preliminary injunction denied, the opinion being filed December 7, 1923. (Tr. p. 25, 295 Fed. 197). Paragraph VIII of appellant's complaint, (Tr. p. 21), stated that appellant had duly applied for a certificate of convenience and necessity under the state statute and had been denied. The statutory court in its opinion stated that appellant had not complied with any provisions of the challenged act and had announced that he did not propose to comply with said act and that if he disposed himself in harmony with the reasonable provisions of the act and was then denied permission to operate, the courts would be open to him.

Appellant then, on December 22nd, 1923, filed an amended compaint, (Tr. p. 1), paragraph X of which, (Tr. p. 7), set out in greater detail his application to the department of public works for a certificate under the state act in question, and his willingness to comply with all the provisions of said act. It will be noted that application was not made to the department as a result of the opinion of the statutory court, but that the amended complaint was simply for the purpose of showing an application to the department and an expressed willingness to comply with the act made long prior to the filing of the original complaint. A further hearing was had before the statutory court under section 266 and the application for the preliminary injunction under the amended complaint was denied by the statutory court in an opinion filed January 7th, 1924, (Tr. p. 34, 295 Fed. 203). On January 15th, 1924, appellee's motion to dismiss, (Tr. p. 12), was filed in the District court and after hearing before said court an order was entered dismissing the complaint on January 21, 1924. (Tr. p. 13). An appeal was prosecuted from such final order of dismissal. An application was thereafter made by appellant to the District court for a stay pending appeal, which was denied and application was made to this court on April 21, 1924, for a stay pending appeal, which was denied by this court on April 28, 1924, this court at that time, however, advancing the case on the docket to November 10, 1924, which date was later continued to November 17, 1924.

Before taking up a discussion of the legal issues we deem it advisable to call the court's attention to some general features of motor vehicle transportation in the state of Washington and particularly on the Pacific highway in said state, and to the development of auto transportation regulations by the various states along lines similar to that embraced in chapter 111, laws of Washington 1921.

This court can take judicial notice of the tremendous increase in the use of automobiles for pleasure and commercial purposes. A compilation made by the department of licenses of the state of Washington shows that the total number of motor vehicles registered in this state for the past eight years has been as follows:

1917	1918	1919	1920
103,001	131,298	161,147	186,827
1921	1922	1923	To Sept. 1, 1924
195,074	220,957	269,749	294,730

It will be noted that the total registered for eight months of 1924 is almost three times as great as the total registered for the year 1917. The increase in mileage of paved highways has greatly facilitated the use of motor vehicles and such use will undoubtedly continue to increase.

The Pacific Highway extends through the state of Washington from British Columbia to Oregon. The appellant desired a certificate to operate auto busses for the transportation of passengers from Seattle to Portland, over said highway. This high-

way is paved throughout and is the main artery for travel by stage lines, truck lines, tourists and in fact all users of motor vehicles. An actual check of motor vehicles from different points on the Pacific highway made by members of the state highway police in different periods throughout the month of July and August, 1924, shows an average of daily traffic at the following points on the Pacific highway which would be along the line over which the appellant seeks permission to operate:

Station	*Average Of All Daily Traffic*	*Auto Stages*
1 M. N. of Vancouver, Clarke Co.	3278	27
Between Chehalis and Centralia, Lewis Co.	2679	13
E. of Olympia, Thurston County	3193	56
Lakeview, Pierce County	4736	118
Morningside, King County	7180	78

In connection with the supervision and regulations of auto transportation companies under the 1921 act referred to, 150 auto transportation companies were operating under certificates of convenience and necessity during the year 1923, using 578 auto stages and 90 auto transportation companies were operating under such certificates in carrying freight, using 337 auto trucks. Reports received by the department of public works from the operators of 556 auto stages during the year 1923 show that such stages traveled 12,794,000 miles and hauled 6,571,000 passengers. The business of such auto

transportation companies, in both freight and passenger, is growing by leaps and bounds and the continued development of paved highways and the popularity of auto service for passengers and the dispatch with which the trucks can handle freight make it certain that this auto transportation business will continue to develop rapidly.

The foregoing conditions relative to the use of motor vehicles are not peculiar to the state of Washington but are general throughout the entire United States. These conditions have caused the legislatures of many of the states to enact statutes for the regulation and supervision of the carrying of passengers and freight between fixed termini for hire by motor vehicles. These acts are all of recent origin and each year sees additional states enacting similar laws. So far as we are informed the following tabulation is a complete list of states which have auto transportation acts similar in character to chapter 111, laws of Washington 1921, or have provisions in their public utility acts conferring powers upon the public service commission similar to the provision of the special auto transportation acts:

Arizona	Chapter 130, Laws of 1919.
California	Statutes 1917, page 330. Statutes 1919, page 457. Statutes 1921, page 609. Deerings supp. 1917 to 1919 page 1518.
Colorado	Public Utilities Act, chapter 110, Laws of 1917.
Connecticut	Chapter 77, Public Acts 1921.

Illinois	Public Utilities Act, Laws 1921, Page 702.
Indiana	Public Utilities Act 1913, Sec. 97. Burns Ann. Stat., 1914, sec. 10052t 3.
Iowa	Chapter 97, Laws 1923.
Kentucky	Chapter 81, Laws 1924.
Maine	Chapter 184, Laws 1921. Chapter 211, Laws 1923.
Maryland	Chapter 180, Laws 1910. Chapter 445, Laws 1914. Chapter 401, Laws 1922. Chapter 291, Laws 1924.
Michigan	Act 209, Laws 1923.
New Hampshire	Chapter 86, Laws 1919.
New York	Chapter 495, Laws 1913. Chapter 667, Laws 1915. Chapter 307, Laws 1919.
North Dakota	Chapter 136, Laws 1923.
Oklahoma	Chapter 113, Laws 1923.
Oregon	Chapter 10, Laws 1921, Special Session.
Pennsylvania	Public Service Act, July 26, 1913, Laws of 1913, page 1375.
Rhode Island	Chapter 2221, Public Laws 1922, General Laws Rhode Island 1923, chapter 254, secs. 3722 to 3735.
South Dakota	Chapter 124, Laws 1923.
Utah	Public Utilities Code, chapter 47, Laws 1917.
Vermont	Act No. 91, Laws of 1923.
Virginia	Chapter 161, Laws of 1923. Chapter 222, Laws of 1924.
Washington	Chapter 111, Laws of 1921. Chapter 79, Laws of 1923.
Wisconsin	Chapter 546, Laws of 1915.

This is a total of 24 states or one-half of the states in the Union, which have found it necessary to provide for the supervision and regulation of these auto transportation companies. The instant case, however, is the first case to come before this court involving the constitutionality of the provisions of such acts relative to the requirement of a certificate of convenience and necessity as a prerequisite to the operation of such companies over the public highways of the state. Congress has passed no legislation regarding interstate operation of such companies and it is apparent, if the provisions of the state act can be nullified by locating one terminal of the route outside of the state so as to constitute interstate operation, it is a matter of great importance to all of the states in the Union and particularly those states which have adopted legislation of the character here under consideration.

We have not attempted to discuss the questions in the same order and manner adopted by appellant in his brief, because of the late service of his brief. The questions at issue relative to the constitutionality of the state statute regulating auto transportation companies will be treated under the following headings:

1. That the state statute does not violate the federal highway act.

2. That the state act does not violate the commerce clause of the United States Constitution.

3. That the state act does not violate the 14th amendment to the Constitution of the United States.

4. That the department of public works of Washington properly denied appellant a certificate of convenience and necessity.

ARGUMENT.

I.

The State Statute Does Not Violate The Federal Highway Acts.

The Pacific highway was constructed in part with funds contributed by the federal government under the provisions of the Federal Aid Act (Act of July 11, 1916, 39 Stat. 355) and the Federal Highway Act (Act of November 9, 1921, 42 Stat. 212). Appellant contends that he has certain vested rights to operate motor propelled vehicles over such federal aid highways and that the provisions of the state act referred to are an unlawful restriction of such right.

It is unnecessary to discuss these federal acts in detail. The act of July 11, 1916, is entitled: "An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes."

Section 2 of the act defines rural post roads and this definition was amended by section 5 of the act of February 28, 1919, (40 Stat. 1200) to read as follows:

"That the Act entitled 'An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes,' approved July 11, 1916, is hereby amended to provide that the term 'rural post roads,' as used in section 2 of said Act, shall be construed to mean any public road a major portion of which is now used, or can be used, or forms a connecting link not to exceed ten miles in length of any road or roads now or hereaf-

ter used for the transportation of the United States mails, *excluding every street and road in a place having a population, as shown by the latest available Federal census, of two thousand five hundred or more,* except that portion of any such street or road along which the houses average more than two hundred feet apart."

Section 7 of the act of July 11, 1916, provides:

"To maintain the roads constructed under the provisions of this Act shall be the duty of the States, or their civil subdivisions, according to the laws of the several States. If at any time the Secretary of Agriculture shall find that any road in any State constructed under the provisions of this Act is not being properly maintained he shall give notice of such fact to the highway department of such State and if within four months from the receipt of said notice said road has not been put in a proper condition of maintenance then the Secretary of Agriculture shall thereafter refuse to approve any project for road construction in said State, or the civil subdivision thereof, as the fact may be, whose duty it is to maintain said road, until it has been put in a condition of proper maintenance."

The Federal Highway Act (Act of November 9, 1921, 42 Stat. 212) was an act to amend the Federal Aid act of 1916 and to extend and make more complete the system of federal aid highways. Section 12 of this act provides:

"That the construction and reconstruction of the highways or parts of highways under the provisions of this Act, and all contracts, plans, specifications, and estimates relating thereto, shall be undertaken by the State highway departments subject to the approval of the Secretary of Agriculture. The construction and reconstruction work and labor in each State shall be done in accordance with its laws

and under the direct supervision of the State highway department, subject to the inspection and approval of the Secretary of Agriculture and in accordance with the rules and regulations pursuant to this Act."

Section 14 of this act provides:

"That should any State fail to maintain any highway within its boundaries after construction or reconstruction under the provisions of this Act, the Secretary of Agriculture shall then serve notice upon the State highway department of that fact, and if within ninety days after receipt of such notice said highway has not been placed in proper condition of maintenance, the Secretary of Agriculture shall proceed immediately to have such highway placed in a proper condition of maintenance and charge the cost thereof against the Federal funds allotted to such State, and shall refuse to approve any other project in such State, except as hereinafter provided. * * *"

Section 18 provides:

"That the Secretary of Agriculture shall prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this Act, including such recommendations to the Congress and the State highway departments as he may deem necessary for preserving and protecting the highways and insuring the safety of traffic thereon."

The Federal Aid Act of 1916 as amended by the Federal Highway Act of 1921 provides for the construction by the state highway department of rural post roads and that upon certain terms and conditions the federal government will contribute funds to aid in such construction subject to the rules and regulations of the secretary of agriculture.

It is evident that under these acts the duty of maintenance of the highways and the general supervision, regulation and control of such highways remains in the state. There is nothing in either act to indicate the purpose of congress to deprive the state of any portion of its power to regulate the use of these federal aided highways, nor has Congress by this act legislated in any manner relative to the use of such highways. Both acts were enacted under the provisions of section 8, article 1 of the federal constitution giving congress power "to establish post-offices and post roads" but it surely cannot be urged that in the exercise of that power congress has attempted to divest the state of its reserve police power which includes the right to build, maintain and regulate highways for the convenience of its citizens. Congress has simply designated what roads shall be considered post roads and has made provision to assist the states in the construction of such roads, but that does not take such highways out of state jurisdiction and make them federal highways except for the very limited purpose of facilitating the transportation and delivery of mail.

The state of Washington, by chapter 76, Laws of 1917, accepted the Federal Aid Act, and such acceptance, no doubt, constitutes a contract between the Federal and state governments. Such contract, however, relates only to the construction, re-construction and maintenance of Federal Aid highways, and does not affect the right of the state to regulate

the use of such highways so long as it does not impose any tolls for operation over such roads. As hereafter pointed out in this brief, the fees prescribed in chapter 111, Laws of Washington for 1921, as amended by chapter 79, Laws of 1923, are, in fact, not tolls.

It will be remembered that appellant seeks to use the highways as a common carrier for hire and it is well settled that a private individual has no vested right to use a public highway of the state as a common carrier.

Appellant's claim of a vested right to use these highways by reason of federal aid in their construction was rejected by the district court. The opinion of the statutory court denying a preliminary injunction on the original complaint after citing the definition of post road in section 2 of the 1916 act stated (*Buck v. Kuykendall,* 295 Fed. 197, 199):

"The court judicially knows that Seattle, Tacoma, Olympia, Chehalis, Centralia, and Vancouver are upon the route sought by the plaintiff, and each contains a population in excess of 2,500. By no stretch of the imagination could the plaintiff, by virtue of the provisions of the act of 1916, supra, assert any interest in the excepted roads and streets, and his assertion of vested right in any portion of the highway is absolutely baseless."

The statutory court after a statement of the general character of the 1916 and 1921 acts referred to, cited section 18 of the 1921 act and then stated at page 199:

"The Congress has not legislated with relation to the use of highways, to the construction of which

the United States contributed, other than as provided by section 18, supra, and if recommendations have been made by the Secretary of Agriculture to the state highway department, the presumption is that such recommendations have been carried out, nothing appearing to the contrary."

The right of the state to regulate the use of highways under its police power and that such regulations do not deprive appellant of any constitutional rights is discussed elsewhere in this brief. We think there can be no serious question that the decision of the district court is correct and appellant has no vested right to use the Pacific Highway or other federal aided highways within the state.

Appellant further contends that the provisions of section 9 of chapter 111 of the laws of Washington of 1921 as amended by section 1 of chapter 79, laws of Washington, 1923, violated the provisions of section 1 of the Federal Aid act and section 9 of the Federal Highway Act, that all highways constructed or re-constructed under the provisions of those acts "shall be free from tolls of all kinds."

Section 1, chapter 79, laws of Washington, 1923, amends section 9 of chapter 111, laws of Washington, 1921, to read as follows:

"For the purpose of carrying out the provisions of this act there is hereby created in the State Treasury a state fund to be known as the 'Auto Transportation Fund.' All fees collected by the Director of Public Works as herein provided shall be paid into the State Treasury monthly and shall be credited to the said 'Auto Transportation Fund.'

"All auto transportation companies operating under the provisions of this act shall between the 1st and 15th days of January, April, July and October of each year, file with the Director of Public Works a statement showing the gross operating revenue of such company for the preceding three months or portion thereof, and shall pay to the said Director a fee not to exceed one per cent of the amount of such gross operating revenue. The percentage rate of gross operating revenue to be paid as provided herein shall be subject to future adjustment by the Director of Public Works, which percentage not exceeding one per cent, shall be fixed by the said Director by general order duly entered at the beginning of each fiscal year, or at the beginning of any quarter. In fixing such rate the Director of Public Works *shall take into consideration all moneys on hand in the said 'Auto Transportation Fund' to the end that the fund created hereunder shall be neither more nor less than sufficient to cover the cost of supervising and regulating auto transportation companies operating under the provisions of this act.*

"MISCELLANEOUS FEES:

"All applications for a certificate of public convenience and necessity shall be accompanied by an application fee of	$25.00
Applications for transfer of a certificate of public convenience and necessity	5.00
Application for the mortgaging of a certificate of public convenience and necessity	5.00
Application for the issuance of a duplicate certificate of public convenience and necessity.	3.00
Application for the issuance of copies of any records of the Department of Public Works pertaining to auto transportation companies, per 100 words or portion thereof	.15"

The contention that fees for licensing and regulating common carriers by motor vehicles violated

the toll prohibition of the federal highway acts was before the district court for the eastern district of Michigan, southern division, in the case of *Liberty Highway Co. v. Michigan Public Utilities Commission,* 294 Fed. 703, decided December 11, 1923, about the same time as the decision of the district court in the instant case. The Michigan district court held that such fees were not a violation of the federal acts. The language of the court at page 708 being as follows:

"Section 9 of the Federal Highway Act of November 9, 1921 (42 Stat. 212 [Comp. St. Ann. Supp. 1923, section 7477¼h]), provides:

"'All highways constructed or reconstructed under the provisions of this act shall be free from tolls of all kinds.'

"This is not in our judgment intended to refer to license fees such as are here involved (it not being even claimed that such act has reference to the analogous fees imposed under general motor vehicle license laws, or to laws licensing drivers of such vehicles). State v. Vigneaux, 130 La. 424, 58 South. 135. The most that can be said of it in this connection is that such a provision is merely a condition attached, as between the federal government and the state, to the contribution of aid provided by federal legislation, and cannot deprive the state of its power and duty as trustee of the public highways for the benefit of the people of the state, to enact reasonable regulations in the exercise of its police power over such highways."

The District court in the *Liberty Highway* case had under consideration the validity of Act 209, Public Acts of Michigan 1923, which is very similar in its general character to chapter 111, Laws of

Washington 1921. The fee provision referred to in the above excerpt in the *Liberty Highway Company* case is found in section 8 of the Michigan Act and requires an annual payment based upon the weight of the motor vehicle. All fees received under the act are appropriated to the general highway fund of the state for highway purposes. It would seem that such fees would be much more like a toll for the use of the highway than the fees required under the Washington Act, which are for regulatory purposes only and are not expended on the highways, yet it will be noted that the District court in the *Liberty Highway Company* case held that such fees were not tolls under the Federal Highway Act.

It is quite uniformly held that a toll is a sum of money charged for the use of a road, bridge or the like of a public nature. Bouvier's Law Dictionary, Rawle's 3d Ed. p. 3283, defines the word "toll" as follows:

"A sum of money for the use of something generally applied to the consideration which is paid for the use of a road, bridge, or the like, of a public nature."

Webster defines the word as:

"A tax paid for some liberty or privilege, particularly the privilege of passing over a bridge or on a highway."

In the earlier history of this country, there was a charge levied either upon the vehicle or the passenger for the liberty of passing over a road, collected

by a toll taker, and the proceeds devoted to the upkeep and maintenance of the road.

See:

Achison v. Huddleson, 12 Howard, 293;

Searight v. Stokes, 3 Howard, 150;

State ex rel. Hines v. Scott County Road Co., 102 S. W. (Mo.) 752;

St. Louis v. Green, 7 Mo. App. 468.

In *Wadsworth v. Smith,* 11 Me. 278, it was tersely said:

"Toll is a settled, certain and defined sum exacted for the use of a common passage."

In *State v. Vigneaux,* 58 So. 135 (La.) it was said:

"That (a toll) is something imposed in the locality where a passage way is used for the special benefit received. The use of a public road is not considered in that light."

In *In re Ops,* 120 Atl. (N. H.) 629, it was said that a toll is not a tax, but simply a charge to reimburse the state for the use of a highway and that a gasoline tax could be constitutionally levied as such toll.

In *Commonwealth v. Closson,* 118 N. E. (Mass.) 653, a carrier of United States mail was arrested for failing to comply with certain statutory and municipal regulations relative to the operation of motor vehicles. The contention was made that the highway in question was a post road and that the mail carrier, therefore, was not amenable to state or municipal

regulations. Answering this, the Massachusetts court said:

"While undoubtedly they are post roads under Act. Cong. March 1, 1884, c. 9, enacting that 'all public roads and highways while kept up and maintained as such are hereby declared to be post routes' (U. S. Comp. St. 1916, Sec. 7457), and whoever knowingly and wilfully obstructs or retards 'the passage of the mail, or any carriage, * * * driver, or carrier, * * * ' is upon conviction subject to fine, or imprisonment, or both, by U. S. Rev. Sts. Sec. 3995, Act of March 4, 1909, c. 321, Sec. 201, 35 Stat. 1127 (Comp. St. 1916, Sec. 10371), yet the ways remain public ways laid out and maintained by the commonwealth, which has the exclusive power not only of alteration, and of discontinuance, but to make and enforce reasonable regulations for their use. Nor do the facilities thereby afforded for transportation of the mails confer extraordinary rights upon mail carriers to use the ways as they please, or necessarily, or impliedly do away with the power of supervision and control inherent in the state. *Commonwealth v. Breakwater Co.*, 214 Mass. 10, 100 N. E. 1034; *Postal Telegraph Cable Co. v. Chicopee*, 207 Mass. 341, 350, 93 N. E. 927, 32 L. R. A. (N. S.) 997; *Dickey v. Turnpike Co.*, 7 Dana (Ky.) 113; *Searight v. Stokes*, 3 How. 151, 11 L. Ed. 537; *Price v. Pennsylvania R. R.*, 113 U. S. 221, 5 Sup. Ct. 427, 28 L. Ed., 980; *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; *Martin v. Pittsburg & Lake Erie R. R.*, 203 U. S. 284, 27 Sup. Ct. 100, 51 L. Ed., 184, 8 An. Cas. 87."

Certainly if a United States mail carrier using a post road is subject to police regulation enacted by the state or one of its civil subdivisions, any other person *a fortiori* is likewise restricted in his use of the highway regardless of the fact that it may be a

post road constructed under the provisions of the Federal Aid Act. While the *Closson* case is not authority upon the question of tolls, it is instructive, we think, upon the question of the true nature of the relationship between the state and the nation in the maintenance, operation and regulation of federal aid roads.

In *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, the court considered the validity of a tax of $5.00 per pole levied upon the telegraph company by the city of St. Louis for the privilege of occupying city streets. The court said that the imposition was not a privilege tax, but a toll or rental for the use of property belonging to the city. It was urged that by virtue of a certain act of Congress granting telegraph companies accepting its privileges, the right to construct, maintain and operate lines of telegraph over post roads, the city could not without violating the provisions of that act, impose the $5.00 fee for the privilege of occupying its streets. In speaking of the nature of the rights of the company the supreme court said:

"It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a state."

The decision points out that under the act, private property of an individual could not be appropriated without compensation, that the same rule would apply to streets and highways which are public

property of the state. Under the rule of this case, the appellant, even if he had been granted a franchise by the federal government to operate as a common carrier over the Pacific Highway, could not do so without compensating the state for the use thereof, and submitting himself to the police regulations imposed by the state.

A similar question arose in *Western Union Telegraph Company v. Richmond,* 224 U. S. 160, in which it was again held that the right to use the soil of the streets or even post roads is not paramount to the right of city or state to impose regulations.

Both of these decisions make it clear that any claim to the unrestricted use of the highway under the so-called post roads acts is subject to the right of the state to dictate the terms and conditions of such use and require compliance with chapter 111 as amended.

By reference to the state statute requiring the payment of fees from auto transportation companies, it will be noted that these fees are not to be used in the construction or maintenance of highways but are designed and adjusted wholly for the purpose of covering the cost of supervision and regulation of the auto transportation companies operating under the state laws. We submit to the court that the fees required under this act are in no sense a toll as that term is used in the federal statutes cited by us but are rather in the nature of inspection fees to cover the cost of enforcing proper police regula-

tions of the state. Such inspection fees have been sustained by this court in many cases.

Patapsco Guano Co. v. N. Carolina, 171 U. S. 345;

McLean v. Denver & Rio Grande, 203 U. S. 38;

Pure Oil Co. v. Minnesota, 248 U. S. 158.

We, therefore, urge upon this court that appellant's claim to a vested right to operate upon federal aided highways and his further claim that the regulatory fees required by the state statute constitute a violation of the toll prohibitions of the federal highway acts are without foundation in law and that the decision of the district court in this respect should be affirmed.

II.

The State Act Does Not Violate Commerce Clause of the United States Constitution.

The appellant in his amended bill of complaint alleges that chapter 111, *supra,* and the action of the director of public works in refusing him a certificate to operate under said act are violative of section 8, article I of the constitution of the United States. Appellant has alleged a willingness to comply with all the provisions of the statute referred to and as set forth in our motion to dismiss, we believe he is estopped from urging the unconstitutionality of the state law. His real grievance is evidently not against the act itself but arises from his failure to obtain permission to operate under the act. It is difficult

to discuss seriously any of his contentions regarding the unconstitutionality of the act for this reason, but assuming, for the sake of argument, that he is entitled to urge such unconstitutionality, we will proceed to consider the state act in relation to the commerce clause of the United States constitution.

Appellant's amended bill of complaint is found on pages 1 to 11, inclusive, of the transcript. Paragraphs 1 to 5, inclusive, contain the necessary allegations relative to citizenship of the parties and plead the federal highway statutes hereinabove referred to, and the state statutes relative to licensing of automobiles and automobile drivers. Paragraph 6 summarizes the provisions of chapter 111, Laws of Washington 1921, as amended by chapter 79, Laws of Washington 1923. Paragraph 7 alleges that under chapter 111, *supra,* the respondent has issued certificates of convenience and necessity to the following operators in the territory named over the Pacific Highway:

Park Auto Transportation Company, between Seattle and Tacoma.

Thompson-Smith Company, between Tacoma and Olympia.

Northwestern Transportation Company, between Olympia and Kelso.

Camas Stage Company, between Kelso and Portland.

That no certificate has been issued for through transportation between Seattle or Tacoma and Portland, and the southern boundary line of Washington. There are further allegations regarding the use of

the Pacific Highway by the above named certificate holders, the character of busses and the character of service rendered by them, and that the appellant, if granted a certificate, will not use any larger or heavier busses or use the Pacific Highway to take on or discharge passengers or cause any hindrance to traffic or inconvenience to the traveling public. Paragraph 8 contains allegations relative to experience and ability of the appellant in auto transportation business. Paragraph 9 alleges that appellant has a certificate to operate in Oregon and has filed with the Oregon commission a schedule of rates and service. Paragraph 10 alleges that appellant applied to the respondent for a certificate under said chapter 111 and tendered compliance with all of the state statutes relative to operation of motor vehicles, including said chapter 111, and that his application for such certificate was denied by respondent in June, 1923, upon the grounds that the four certificate holders and the present railroad service between Seattle and Tacoma and Portland furnished adequate transportation to the public and that the appellant did not show sufficient financial ability. It is alleged that plaintiff is financially able. Paragraph 10 concludes with the following allegation:

"That by reason of the said action of the said defendant, this plaintiff has not been and will not be able to comply with any other provision of Chapter 111, as amended, as defendant herein has refused to and will continue to refuse to permit the plaintiff so to do and said denial of said certificate was not based upon the r*u*fusal of plaintiff to comply with

any provisions of the laws or rules and regulations of the department as plaintiff had complied so far as he has been permitted so to do by said defendant with all laws, rules and regulations. Further, this plaintiff is ready, willing and able and agrees to and will conform to and comply with all of the provisions of chapter 111, as amended, and the rules and regulations of the Department of Public Works of the State of Washington, regulating the equipment and the operations of motor vehicles on the Public Highways as specifically set forth in the said clause of the said application as herein above set forth."

Paragraph 11 alleges that unless granted a certificate he will lose his Oregon rights. Paragraph 12 is as follows:

"The plaintiff says further, that the railroad fare between the Cities of Seattle, Washington, and Portland, Oregon, is $6.58, and the fare by the said local stages between the said points is $6.85; the railroad fare between Tacoma, Washington, and Portland, Oregon, is $5.21, and the fare by said stages between said points is $5.85, that the fare filed by plaintiff as hereinbefore set out saves the traveling public large sums of money, all of which reduces the cost on interstate commerce.

"That the said action of the said Director in refusing to permit the operation in said interstate commerce directly burdens said commerce as the same is prohibited and the traveling public suffers thereby.

"The plaintiff says further, that the provisions of said law, Chapter 111, of the Session laws of 1921, compelling the *the* plaintiff to obtain a certificate or license to engage in interstate commerce and vesting sole jurisdiction or authority in the Director of Public Works to grant or refuse such certificate, but restricting one certificate holder in the same territory, as well as the acts of the defendant in denying the certificate or license to operate motor propelled vehicles, engaged wholly in interstate commerce, be-

tween Seattle, Washington, and the southern boundary line of Washington at Vancouver, over and along the same Public Highways, which have received Federal aid as are now operated over by 4 certificate holders restricted to intrastate commerce, and to be regulated by the same laws, rules and regulations as regulate the said 4 certificate holders; take plaintiff's property without due process of law, destroy his privileges and immunities to engage in interstate commerce, not only in the State of Washington but also in the State of Oregon, have created a monopoly on Federal Aided Interstate Public Highways, have violated the contract made by the State under the provisions of which it has received Federal aid, discriminate against interstate commerce on such Public Highways in favor of Intrastate commerce, and prohibit interstate commerce to be carried on under the same laws, rules and regulations of the state of Washington as are applied to and under which intrastate business is now carried on on said Public Highways, all of which are contrary to and in contravention of the constitution of the United States, especially the 14th Amendment thereof and article 1, section 8 thereof, the protection of which Constitution the plaintiff prays."

There is no Paragraph 13 and Paragraphs 14, 15 and 16 allege that if an injunction is not granted, appellant and his agents will be arrested for operating without a certificate; that the matters involved exceed $3,000.00 in value and a prayer for the issuance of a preliminary injunction and upon a final hearing, a permanent injunction, and that said chapter 111 "relating to and compelling the obtain—of a certificate in order to operate motor propelled vehicles engaged in interstate commerce be declared void and unconstitutional." It will be noted that

appellant's only serious objection to the act as set forth in his amended complaint has reference to the requirement of a certificate of convenience and necessity prior to engaging in the operation of motor vehicles for compensation, and that he does not object to the other provisions of the act relative to liability insurance, fees, etcetera. In any event, the appellant, not having obtained a certificate and not having been required to furnish any liability insurance or pay any fees and being willing to comply with all the provisions of the act, would not at this time be in a position to object to any provision other than the one relating to the issuance of a certificate. We are confining our discussion of the act therefore, to that portion objected to by appellant.

Chapter 111, laws of Washington for 1921 is entitled:

"An act providing for the additional supervision and regulation of the transportation of persons, and property for compensation over any public highway by motor propelled vehicle: Defining transportation companies and providing for additional supervision and regulation thereof by the public service commission, providing for the enforcement of the provisions of this act and for the punishment of the violations thereof."

Section 1 of the act consists of definitions, subdivision (d) of which defines auto transportation companies as follows:

"The term 'Auto Transportation Company' when used in this act means every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controll-

ing, operating or managing any motor propelled vehicle not usually operated on or over rails used in the business of transporting persons, and, or, property for compensation over any public highway in this state between fixed termini or over a regular route, and not operating exclusively within the incorporated limits of any city or town; * * *"

Section 2 provides:

"No corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, shall operate any motor propelled vehicle for the transportation of persons, and, or, property for compensation on any public highway in this state, except in accordance with the provisions of this act."

Section 3 places auto transportation companies under the jurisdiction of the public service commission which is now the Department of Public Works, of which department respondent is director, and gives said department full power to supervise and regulate such companies and to prescribe rules and regulations therefor. Section 4, which is the section particularly objected to by appellant, provides:

"No Auto Transportation Company shall hereafter operate, for the transportation of persons, and, or, property for compensation between fixed termini, or over a regular route in this state, without first having obtained from the Commission under the provisions of this act a certificate declaring that public convenience and necessity require such operation; but a certificate shall be granted when it appears to the satisfaction of the commission that such person, firm, or corporation was actually operating in good faith over the route for which such certificate shall be sought on January 15th, 1921. Any right, privilege, certificate held, owned or obtained by an auto

transportation company may be sold, assigned, leased, transferred or inherited as other property, only upon authorization by the Commission. The Commission shall have power, after hearing, when the applicant requests a certificate to operate in a territory already served by a certificate holder under this act, only when the existing auto transportation company or companies serving such territory will not provide the same to the satisfaction of the Commission, and in all other cases with or without hearing, to issue said certificate as prayed for; or for good cause shown to refuse to issue same, or to issue it for the partial exercise only of said privilege sought, and may attach to the exercise of the rights granted by said certificate to such terms and conditions as, in its judgment, the public convenience and necessity may require."

In connection with the latter part of this section, it will be noted that the Department of Public Works, in denying a certificate to appellant, did so upon the ground that the territory was already served by certificate holders under this act, together with railroad companies. No question of the issuance of a certificate by reason of good faith operation on January 15th, 1921, is involved in this case. Section 5 relates to liability and property damage insurance; sections 6 and 7 to procedure before the commission and appeal therefrom to the courts, and penalties for violations of the act. Section 8 provides:

"Neither this act nor any provision thereof shall apply or be construed to apply to commerce with foreign nations or commerce among the several states of the Union except in so far as the same may be permitted under the provisions of the Constitution of the United States and the Acts of Congress."

Section 9 relates to fees and has been amended by section 1 of chapter 79, laws of 1923, and as amended is set forth in full on page 23 of this brief. Section 10 provides that partial invalidity shall not affect the remaining portion of the act, and section 11 provides that the act shall not repeal any existing laws relating to motor vehicles.

It has been repeatedly recognized by this court that in matters affecting interstate commerce the states may legislate with reference to local needs where there has been no congressional legislation with respect thereto. The declaration of this principle is clearly expressed by Mr. Justice Hughes in the *Minnesota Rate Cases,* 230 U. S. 352, 402; 57 L. ed. 1511, 1542. Other cases to this same effect are:

Missouri Pacific Railway Co. v. Larabee Flour Mills Co., 211 U. S. 612, 623; 53 L. Ed. 352, 361;

Atlantic Coast Line v. Georgia, 234 U. S. 280, 290; 58 L. Ed. 1312, 1317;

Missouri Kansas and Texas Railway Co. v. Harris, 234 U. S. 412, 416; 58 L. Ed. 1377, 1381;

Hendrick v. Maryland, 235 U. S. 610, 622; 59 L. Ed. 385, 391;

Kane v. New Jersey, 242 U. S. 160; 61 L. Ed. 222;

Chicago, Milwaukee and St. Paul Railway Co. v. Public Utilities Commission, 242 U. S. 333, 336; 61 L. Ed. 341, 347;

Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23, 29; 64 L. Ed. 434, 442.

Congress has passed no act relative to interstate transportation by motor vehicles and it has been held in numerous cases that legislation of the character of chapter 111, *supra,* is of local nature, therefore, until Congress occupies this field by comprehensive national legislation, the act of the Washington legislature is valid.

It has also been repeatedly recognized by this court and the lower federal courts, that the states may, under their police power, pass acts which indirectly affect interstate commerce, and that the regulation and use of the public highways of the state is a proper exercise of the police power. This right to pass legislation affecting interstate commerce in the absence of congressional legislation and under the police power to regulate the use of the highways, is most clearly set forth in the case of *Hendrick v. Maryland, supra,* as follows:

"In the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horse-power of the engines—a practical measure of size, speed, and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the states and essential to the preservation of the

health, safety, and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce. The reasonableness of the state's action is always subject to inquiry in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress."

While a number of states now have legislation similar to chapter 111, *supra,* requiring certificates for auto transportation companies, so far as we have been able to discover there have only been, in addition to the instant case, eight cases in which this question of the effect of a state statute on interstate commerce has been in issue. In every one of these cases the state courts, United States District courts and this court have held that such regulation of motor vehicle transportation was a valid exercise of the police power of the state and was not in violation of the commerce clause of the United States constitution. Two of these cases were in this court. The *Hendrick v. Maryland, supra,* case had to do with an act of the state of Maryland (chapter 207, laws of Maryland 1910, p. 177), prescribing a comprehensive scheme for licensing and regulating motor vehicles. The *Hendrick* case was followed in the case of *Kane v. New Jersey, supra,* dealing with a similar act of the state of New Jersey (Public Laws of New Jersey, 1908, p. 613).

The Washington law herein involved was attacked upon this same ground in the case of *Interstate Motor Transit Co. v. Kuykendall,* 284 Fed. 882. The objection that the act was a burden upon inter-

state commerce was disposed of by the District court of Washington, Northern Division, in that case, in the following language:

"The state of Washington has expended and is expending many millions of dollars for the construction and reconstruction of highways within its boundaries. The act in question, and the acts of the state of which it is supplementary, provide for a comprehensive system of highways, and for the regulation of motor and other vehicles operating thereon. Among the powers granted to the national government is the regulation of interstate commerce. Article 1, section 8, Const. While Congress has exercised this power in a variety of acts, it has not done anything which in any way takes from the state the control of the highway within its boundaries, and the right to charge a reasonable compensation for the privilege of driving motor vehicles thereon.

"(2) The fact that interstate commerce may be affected by state legislation, is not in conflict with the Constitution, if made common to all, and is a reasonable regulation. It was so held in *Transp. Co. v. Parkersburg,* 107 U. S. 691, 2 Sup. Ct. 732, 27 L. Ed. 584, where a state constructed wharves along the banks of its navigable rivers, which were used for commerce between the states, and charged wharfage fees for the privilege of receiving and landing passengers and freight thereon; in *Huse v. Glover,* 119 U. S. 543, 7 Sup. Ct. 313, 30 L. Ed. 487, the construction of locks in navigable rivers and a reasonable charge for tolls for using such locks while engaged in interstate commerce was upheld; and the construction of booms for the purpose of increasing the facilities of floating, gathering and booming logs in navigable waters, and a reasonable charge made therefor was upheld in *Lindsay & Phelps v. Mullen,* 176 U. S. 126, 20 Sup. Ct. 325, 44 L. Ed. 400.

"(3) Clearly the purpose of the act in question was not to regulate interstate commerce. Any

one, so far as the act is concerned, may carry passengers for hire from California or Oregon to Washington, or from Washington to Oregon or California. It is only when a party so engaged seeks to appropriate the highway of the state, and this may not be done without the permission of the state. *G. T. W. Ry. Co. v. South Bend,* 227 U. S. 544, 33 Sup. Ct. 303, 57 L. Ed. 633, 44 L. R. A. (N. S.) 405; *Seaboard Air Line Co. v Raleigh,* 242 U. S. 15, 37 Sup. Ct. 8, 61 L. Ed. 121."

The court then continues with citations from *Kane v. New Jersey, supra,* and *Hendrick v. Maryland, supra.*

After the *Interstate Motor Transit Company* case was decided, this same act was attacked in the state courts and was upheld by the Supreme court of Washington in the case of *Northern Pacific Railway Co. v. Schoenfeldt,* 123 Wash. 579, 213 Pac. 26, in an *en banc* decision rendered February 15, 1923. The *Schoenfeldt* case was followed by our state court in the case of *State, ex rel. Schmidt v. Department of Public Works,* 123 Wash. 705, 213 Pac. 31. In the *Schoenfeldt* case, after summarizing the provisions of the statute and stating the rule governing state action affecting interstate commerce as set forth in 12 Corpus Juris 12, the court observes, on page 585:

"The purpose of the act under consideration is clearly apparent from its title and contents, and that purpose is to regulate the use of the highways of the state by those engaged in carrying on business theron for their own private gain, whether engaged in interstate or intrastate commerce, and it applies alike to each class without discrimination.

"We have repeatedly held that the legislature may regulate the use of the highways for carrying on business for private gain, and that such regulation is a valid exercise of the police power. *State v. Seattle Taxicab & Transfer Co.,* 90 Wash. 416, 156 Pac. 837; *Allen v. Bellingham,* 95 Wash. 12, 165 Pac. 18; *Hadfield v. Lundin,* 98 Wash. 657, 168 Pac. 516, Ann. Cas. 1918C 942; and *State ex rel. Schafer v. Spokane,* 109 Wash. 360, 186 Pac. 864. * * *"

"We therefore hold that the act in question is a valid police regulation and as such is binding upon all who use the highways for the purpose of private gain, unless it is a constitutional burden upon those engaged in interstate commerce. * * *"

After quoting from *Hendrick v. Maryland, supra,* and *Kane v. New Jersey, supra,* the court continues:

"The act of 1921, to paraphrase the language of Mr. Justice Hughes, above quoted, is a protective measure of a reasonable character in the interest of the safety and welfare of the people of this state—safety, because by the terms of the act the highways may not be used for private gain unless in the judgment of the department of public works, after a full hearing, such use will tend to the convenience or serve the necessities of the public, and unnecessary congestion with its attendant dangers be thereby prevented. Welfare, because the highways are built and maintained at great expense and all traffic thereon is to some extent destructive, therefor the prevention of unnecessary duplication of auto transportation service will lengthen the life of the highways or reduce the cost of maintenance. The revenue to be derived by the state under the terms of the act will also tend toward the public welfare by producing, at the expense of those operating for private gain, some small part of the cost of repairing the wear and deterioration which they by their operations occasion.

"We conclude that no feature of the act is a prohibition of, or a direct burden upon, interstate commerce.

"But it is contended that section 8 of the act specifically includes such operations as are here shown. So far as it is necessary to construe that section, we think it clearly prospective, enacted with a view to a possible future time when Congress may assert its right to regulate and control such transportation; that it was inserted for the purpose of strengthening the act, and not to limit it, except as the courts might hold that Congress had by proper legislation assumed jurisdiction."

The Supreme court of Oregon, in the case of *Camas Stage Co. v. Kozer*, 209 Pac. 95, upheld the Oregon motor vehicle law, chapter 371, General Laws of Oregon 1921, as against the contention that it was a violation of the commerce clause. The Circuit court of Appeals of Maryland upheld the statutes of that state giving the Public Service Commission power to issue certificates of convenience similar to the Washington act involved in this case, in the case of *Geo. W. Bush & Sons Co. v. Maloy*, 123 Atl. 61. The language of the Maryland court, on page 64, is pertinent:

"If the contention of the appellant be correct, that the attempted regulation of the use of the highways of this state by the Public Service Commission under the statute mentioned is unconstitutional and void when applied to the appellant and others who apply for permits to engage in the transportation of freight and merchandise from points in this state to points in some other state, then there are no regulations of the use of the highways, nor can there be any until Congress sees fit to pass them, and this it may never do. If it does not, these valuable

highways of the state will be subject to the use of motor vehicles of all sizes and character by the persons mentioned. This should not be, and in our opinion is not, the law. But, as we have said, this case is controlled by the principles laid down in the Minnesota Rate Cases, and until Congress passes some legislation regulating the use of said highways, by the instrumentalities here mentioned, the right to do so, within the limitations mentioned in those cases, is lodged with the Legislature of this state."

In the case of *Liberty Highway Co. v. Michigan Public Utilities Commission,* 294 Fed. 703, the District court for the Eastern District of Michigan, Southern Division, upheld the Michigan Motor Vehicle Act (Public Acts of Michigan, 1923, No. 209). This act is similar in its general character to chapter 111, *supra.* With reference to the commerce clause the court observes, on page 707:

"The commerce clause of the federal Constitution does not, however, deprive the states of the right to reasonably regulate under their police power the use of their public highways, and to that end to require a license and impose a reasonable charge therefor, for the privilege of such use, even if thereby interstate commerce is incidentally affected, provided that such regulation, license, and charge bear a reasonable relation to the safe and proper maintenance and protection of such highways, do not obstruct or burden interstate commerce, and are not in conflict with federal legislation on the same subject enacted within constitutional limitations."

We fail to see how appellant derives any comfort from the case of *Carlsen v. Cooney,* 123 Wash. 441, as that case simply held that a transfer company which did not operate on a schedule or between fixed ter-

mini did not come within the provisions of chapter 111, Laws of 1921, and that such a person could operate over a route served by a certificate holder. Furthermore, in this case the supreme court of Washington has interpreted chapter 111, Laws of 1921, not as a prohibitory measure, but as a regulatory one, as evidenced by the following language:

"Looking to the language of the title of the act, it seems plain to us that it evidences an intent to regulate rather than prohibit; and when we look to the whole of the body of the act with a view of harmonizing its provisions with what seems so clearly expressed in its title, we are prone to believe that the legislature intended nothing more than to provide for the regulation of the transportation business by motor propelled vehicles over the public highways of the state 'between fixed termini or over regular routes;' * * *"

We ask the court to consider the conditions which will arise if it should be held that the provisions of the state auto transportation act relative to certificates of convenience and necessity do not apply when an application is made for interstate operation but that such operation may be engaged in by auto transportation companies without complying with the provisions of the state act. There are, at the present time, a considerable number of auto transportation companies operating in this state in interstate service under such certificates. These operators would cease to be under the supervision and regulation of the department of public works. Many other auto transportation companies now engaged wholly in intrastate service could, at little addi-

tional cost and inconvenience, extend their service across the state lines and in like manner take themselves out of the jurisdiction of the department. Numerous others desiring to engage in what would appear to them to be a profitable field of endeavor would immediately inaugurate interstate service. Practically the entire state of Washington could be covered by auto transportation passenger and freight service from Portland, Pendleton and other Oregon cities, Lewiston, Moscow, Coeur d'Alene and other Idaho cities and numerous towns along the Canadian border. In like manner Oregon and Idaho could be served by auto transportation companies operating out of Washington towns. The result would be an increase in auto transportation service far in excess of the needs of the public; a great additional burden upon the highways, federal aided, state and county; increased danger to the traveling public upon such highways. There would soon be cutthroat rate competition followed by a decrease in efficiency of service to the ultimate detriment of the public welfare. Chaos and confusion in auto transportation would be the inevitable result. In other words, if the auto transportation act is not a proper exercise of the police power of the state as to those desiring to engage in interstate operation, the state is practically powerless to protect the safety and welfare of its people during the period when Congress has failed to provide for national regulation of auto transportation. We feel sure that the state statute and the

powers conferred thereunder upon the department of public works are a valid exercise of the police power of the state.

Inasmuch as all of the courts, state and federal, which have had occasion to consider the effect upon interstate commerce of state statutes regulating motor vehicle transportation, have sustained the state acts as not placing a burden upon interstate commerce and as being a valid exercise of the police power of the state in the absence of congressional legislation, we believe that the District court, in the instant case, should be affirmed.

III.

The State Act Does Not Violate the Fourteenth Amendment of the Constitution of the United States.

Appellant contends that the state act in question deprives him of property without due process of law, destroys his privileges and immunities to engage in interstate commerce, and creates a monopoly on Federal Aided highways, discriminates against interstate commerce and prohibits such commerce to be carried on under the same laws, rules and regulations as applied to intrastate commerce. For the reasons set forth in our motion to dismiss and referred to under the second heading above, we do not believe that appellant is entitled to contend that chapter 111 violates the fourteenth amendment, but assuming, for the sake of argument, that the ques-

tion is properly before this court, we shall endeavor to show that the act is entirely consistent with that amendment.

We have shown in the cases cited in the preceding heading, that the regulation of the highways is a proper exercise of the police power of the state. The particular reasons which not only justify but make it necessary for the regulation of the use of highways by motor propelled vehicles have been repeatedly set forth by the courts. We will not burden the record with innumerable citations to this effect, but will quote two typical cases:

In *Hendrick v. Maryland,* 235 U. S. 610, 622, 59 L. Ed. 385, 390, Mr. Justice McReynolds says:

"The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends on good roads, the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the states for better facilities, especially by the ever-increasing number of those who own such vehicles. As is well known, in order to meet this demand and accommodate the growing traffic the state of Maryland has built and is maintaining a system of improved roadways. Primarily for the enforcement of good order and the protection of those within its own jurisdiction the state put into effect the above described general regulations, including requirements for registration and licenses. A further evident purpose was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential, and whose operations over them are peculiarly injurious."

In the case of *Geo. W. Bush & Sons Co. v. Maloy,* 123 Atl. 61, 63, the court stated:

"A statutory regulation of this character is essential not only to the protection of the above-mentioned highways built at great expense to the state and counties, but also to the safety of the public who travel upon them. The roads and highways are subject to great damage and injury when used by very large motor vehicles equipped without regard to the effect their use will have upon the roads, and, of course, the injury or damage is greater when large numbers of them are operated thereon; consequently the number of them used for profit and gain in the transportation of freight or passengers should be restricted to the public need or convenience, and, when the number is in excess thereof, their use becomes prejudicial to the welfare and convenience of the public. The operation of motor trucks upon these highways in most, if not all, cases is a great convenience to the public, especially to those persons living along the route on which they are operated. It is therefore important that the use of the highways shall be so regulated as to assure the enjoyment of this right to the public, which right may be seriously affected by the failure of those to whom the privilege is granted to give proper service, caused by their inability to operate with a profit, resulting from the excessive number to whom such privilege is granted. The object and purpose of the act is to restrict to the needs of the public the number of motor vehicles used in the transportation of freight or merchandise upon any one route, and thereby avoid the additional injury and damage to the roads or highways, and the danger to persons traveling thereon, that would result from the use of a greater number than the needs and convenience of the public require. It must be that the safety of the traveling public is lessened by the increased number of motor trucks operating upon the roads."

A proper exercise of the police power by a state does not contravene the fourteenth amendment. With reference to the contention that the motor vehicle law of Oregon is violative of the fourteenth amendment, the Supreme court of that state, in the case of *Camas Stage Co. v. Kozer,* 209 Pac. 95, 98, observes:

"The plaintiff invokes the protection of the Fourteenth Amendment to the Constitution. That amendment does not offer the plaintiff a refuge from the demands of the Motor Vehicle Law, which is an enactment within the police power of the state.

"The Supreme Court of the United States has frequently declared that the limitations contained in the Fourteenth Amendment were not designed to limit, or in any way interfere with the state's exercise of its police power. *Barbier v. Connolly,* 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *Jones v. Brim,* 165 U. S. 180, 17 Sup. Ct. 282, 41 L. Ed. 677; *L'Hote v. New Orleans,* 177 U. S. 587, 596, 20 Sup. Ct. 788, 44 L. Ed. 899; *Lochner v. New York,* 198 U. S. 45, 53, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133.

"In *Barbier v. Connolly, supra,* Mr. Justice Field wrote:

"'But neither the amendment, (Fourteenth Amendment)—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.'"

The courts have repeatedly held that no one has the right to use the public highways of the state as a common carrier and that under the police power right to regulate the use of such highways,

their use by common carriers may be restricted or even entirely prohibited. The right to use the public highways is held to be a privilege and not an absolute property right.

In the case of *Schoenfeld v. City of Seattle,* 265 Fed. 726, 731, the district court for the Western District of Washington, in a case involving the validity of a jitney ordinance of the City of Seattle, stated:

"The plaintiff purposes to utilize the public streets of the city for a special purpose and private gain, a right not common at all. As to such the Washington court in *Allen v. Bellingham, supra,* said 'The power of the city as to such users of the streets is entirely plenary,' and quoted with approval from *Ex parte Dickie,* 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840, 'The power or right to use the street may be wholly denied'."

In the case of *Lutz v. City of New Orleans,* 235 Fed. 978, 981, the District court for the Eastern District of Louisiana, in a case involving a jitney ordinance of the city of New Orleans, stated:

"Plaintiffs, however, do not pretend to have a franchise to use the streets, but rely upon their general rights as inhabitants of the city. It is settled that the Fourteenth Amendment does not create any right in a citizen to use the public property in defiance of the laws of the state. *Davis v. Massachusetts,* 167 U. S. 43, 17 Sup. Ct. 731, 42 L. Ed. 71. No one has the vested right to make the use of the streets of the city the basis of his business, such as a common carrier, regardless of what may be his rights as a citizen to otherwise use them. Statutes regulating common carriers may go to great lengths without being confiscatory. Rates and schedules may be

regulated, and the absolute liability of insurers, regardless of negligence, may be imposed."

The Supreme court of the state of Washington, in the case of *Hadfield v. Lundin,* 98 Wash. 657, 660, in considering chapter 57, Laws of Washington 1915, regulating jitneys, stated:

"The streets and highways belong to the public. They are built and maintained at public expense for the use of the general public in the ordinary and customary manner. The state, and the city as an arm of the state, has absolute control of the streets in the interest of the public. No private individual or corporation has a right to the use of the streets in the prosecution of the business of a common carrier for private gain without the consent of the state, nor except upon the terms and conditions prescribed by the state or municipality, as the case may be. The use of the streets as a place of business or as a main instrumentality of business is accorded as a mere privilege and not as a matter of natural right."

In the case of *Ex parte Dickie,* 85 S. E. 781, 782, the Supreme Court of Appeals of West Virgina, in construing an ordinance of the City of Huntington regulating jitney busses, stated:

"The right of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a common right, a right common to all, while the latter is special, unusual, and extraordinary. As to the former, the extent of legislative power is that of regulation; but as to the latter, its power is broader. The right may be wholly denied, or it may be permitted to some and denied to others, because

of its extraordinary nature. This distinction, elementary and fundamental in character, is recognized by all the authorities."

The same court again, in the case of *Carson v. Woodram,* 120 S. E. 512, 513, in construing an act of the state of West Virginia, regulating automobile transportation within that state (chap. 112, Acts of West Virginia 1921), stated:

"The power of the Legislature to so regulate the use of the public roads, highways, and streets and alleys in incorporated cities and towns, of this state is clearly justified as proper exercise of the police power.

"The right of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a right common to all, while the latter is special, unusual and extraordinary. As to the former, the extent of the legislative power is that of regulation; but as to the latter, its power is broader. The right may be wholly denied, or it may be permitted to some and denied to others, because of its extraordinary nature. Ex parte Dickey, 76 W. Va. 576, 85 S. E. 781, L.R.A. 1915F, 840; Ex parte Cardinal, 170 Cal. 519, 150 Pac. 348, L. R. A. 1915F, 850; Hadfield v. Lundin, 98 Wash. 657, 168 Pac. 516, L. R. A. 1918B, 909, Ann. Cas. 1918C, 942; Desser v. Wichita, 96 Kan. 820, 153 Pac. 1194, L. R. A. 1916D, 246; Huston v. Des Moines, 176 Iowa, 455, 156 N. W. 883, L. R. A. 1916E, 524; McQuillin Mun. Corp. Sec. 1620.

"The use of the highways for the public transportation of freight and passengers belongs to the public. This use may therefore be completely regulated and controlled by the Legislature in the

interest of the public welfare. Le Blanc v. New Orleans, 138 La. 243, 70 South, 212; New Orleans v. Le Blanc, 139 La. 113, 71 South, 248; Lutz v. New Orleans, (D.C.) 235, Fed. 978." See also the case of *Nolen v. Riechman,* 225 Fed. 812.

It will be noted that section 6, chapter 111, *supra,* provides that any order of the Department of Public Works may be reviewed by the superior and the supreme courts of the state in the manner provided for in the Public Service Commission law. Such provisions for review will be found in sections 86 and 88, chapter 117, laws of Washington, 1911, being sections 10428 and 10430, Rem. Comp. Stat. Since the statute makes complete provisions for judicial review of any order of the department, granting or denying a certificate of convenience and necessity, the requirement for due process of law is fully satisfied.

We have shown in the first subdivision of this brief that under the Federal highway acts the regulation, supervision and control of such highways within the state is left to the state until such time as Congress otherwise provides. This being true and the state having under its police power the right to restrict or prohibit entirely the use of such highways by motor vehicles as common carriers, it is apparent that appellant had no property right to so use the highways and the provisions of section 4, chapter 111, *supra,* requiring him to obtain a certificate of convenience and necessity before so operating, together with the provision of section 6 that the

granting or denying of such certificate might be reviewed by the courts, clearly do not violate the provision of the fourteenth amendment that no state shall make or enforce any law which shall abridge privileges or immunities of citizens, nor deprive any citizen of life, liberty or property without due process of law.

Appellant's other contention relative to discrimination and monopoly, as being violative of the fourteenth amendment, would relate to the equal protection of the laws clause of that amendment. It has been repeatedly held that the legislature may delegate to an administrative department or officer the right to determine whether or not one is entitled to use public property or obtain a license to engage in business. In the case of *Davis v. Commonwealth of Massachusetts,* 167 U. S. 43, 42 L. Ed. 71, this court sustained an ordinance prohibiting any person from making public addresses on public grounds of the city without a permit from the mayor. The court observes:

"The assertion that although it be conceded that the power existed in the state or municipality to absolutely control the use of the Common, the particular ordinance in question is nevertheless void because arbitrary and unreasonable in that it vests in the mayor the power to determine when he will grant a permit, in truth, whilst admitting on the one hand the power to control, on the other denies its existence. The right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser. The finding

of the court of last resort of the state of Massachusetts being that no particular right was possessed by the plaintiff in error to the use of the Common, is in reason, therefore, conclusive of the controversy, which the record presents, entirely aside from the fact that the power conferred upon the chief executive officer of the city of Boston by the ordinance in question may be fairly claimed to be a mere administrative function vested in the mayor or in order to effectuate the purpose for which the common was maintained and by which its use was regulated. Ex parte Kollock, 165 U. S. 526, 536, 537 (41:813,-816,817). The plaintiff in error cannot avail himself of the right granted by the state and yet obtain exemption from the lawful regulations to which this right on his part was subjected by law."

In the case of *Gundling v. Chicago,* 177 U. S. 183, 198, 44 L. Ed. 725, 728, this court in construing an ordinance giving the mayor power to determine whether a person should receive a license to sell cigarettes, said:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference."

In the case of *New York ex rel. Lieberman v. Van De Carr,* 199 U. S. 552, 562, 50 L. Ed. 305, 311, this court after discussing numerous prior cases regarding this delegation of authority, stated:

"These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of rights secured by the 14th Amendment. There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual, under sanction of state authority, this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a Federal court."

The lower court in the instant case held that the delegation to the Department of Public Works of the authority in the statute was proper.

It is apparent therefore that the provision of chapter 111, *supra,* authorizing the Department of Public Works to determine whether public necessity and convenience require the issuance of a certificate to operate as an auto transportation company is not violative of the 14th Amendment.

Appellant contends that the provision for denying a certificate in the event the public is being adequately served by the present operators makes it possible to create a monopoly. On the contrary we contend that this is only a proper exercise of the police power of the state for the protection of the traveling public. The reasons for restricting the is-

suance of certificates to use the highways as common carriers are well expressed by the Supreme Court of Illinois in the case of *West Suburban Transportation Company v. Chicago and W. T. Ry. Co.*, 140 N. E. 56, 58:

"If the transportation facilities furnished by appellee are so inadequate as to subject the public to inconvenience, and the operation of appellant's bus lines would eliminate that inconvenience, the order of the commission was authorized. It is not the policy of the Public Utilities Act to promote competition between common carriers as a means of providing service to the public. The policy established by that act is that, through regulation of an established carrier occupying a given field and protecting it from competition it may be able to serve the public more efficiently and at a more reasonable rate than would be the case if other competing lines were authorized to serve the public in the same territory. Methods for the transportation of persons are established and operated by private capital as an investment, but as they are public utilities the state has the right to regulate them and their charges, so long as such regulation is reasonable. The policy of the Public Utilities Act is that existing utilities shall receive a fair measure of protection against ruinous competition. Rates of fare charged for service are subject to regulation by the Commerce Commission within reasonable limits, but the commission has no power to make a rule or order regulating a utility which would amount to a confiscation of its property or require operation under conditions which would not provide a reasonable return upon the investment. Where one company can serve the public conveniently and efficiently, it has been found from experience that to authorize a competing company to serve the same territory ultimately results in requiring the public to pay more for transportation, in order that both companies may

receive a fair return on the money invested and the cost of operation."

The lower court in the instant case held that the power to grant a franchise to whom it will did not create a monopoly against law or public policy, citing in support of its decision the following authorities which fully sustain the lower court:

Cooley's Constitutional Limitations (7th Ed.) 564;

Haddad v. State, 23 Ariz. 105, 201 Pac. 847;

People v. Willcox, 207 N. Y. 86, 100 N. E. 705, 45 L. R. A. (N. S.) 629;

Utilities Commission v. Garviloch, 54 Utah 406, 181 Pac. 272;

Hadfield v. Lundin, 98 Wash. 657, 168 Pac. 516, L. R. A. 1918B, 909 Ann. Cas. 1918C, 942;

Allen v. Bellingham, 95 Wash. 12, 163 Pac. 18.

It is evident that the statute does not discriminate between interstate and intrastate auto transportation companies as its requirements apply equally to all desiring to use the public highways for auto transportation and the statute in section 8 has expressly declared that it shall not apply to interstate commerce when Congress has made any legislation to the contrary. As to any other basis of classification the statute does not contravene the equal protection clause of the Federal Constitution. Several of the cases heretofore cited on other features of the fourteenth amendment have likewise held that such an act is not an improper classification and it is un-

necessary to further enlarge the brief by citations to innumerable decisions of the state courts construing jitney ordinances as not being violative of the fourteenth amendment, by reason of being improper class legislation. The reasoning of these jitney cases is equally applicable in the instant case.

In the case of *Liberty Highway Co. v. Michigan Public Utilities Commission, supra,* 294 Fed. 703, 709, the District court of Michigan, in construing the Michigan Act, very similar to the Washington Act involved here, stated:

"The statute is not class legislation because it applies only to common carriers operating over fixed routes. It is well known that commercial motor vehicle transportation, and highway maintenance expense resulting therefrom, is rapidly increasing; that traffic on main highways is greatly congested. It is not an unreasonable classification under the police power to make a distinction between those common carriers whose use of the highways is more regular, and hence more frequent, and whose operation on the highways is attended with greater danger to life and property, and greater damage to the highways and those carriers whose use of the highways is only occasional and spasmodic. Such a distinction does not constitute an arbitrary discrimination, it being settled that every state of facts sufficient to sustain a classification which can be reasonably conceived of as having existed when the statute was enacted will be assumed by the court."

In the case of *Lane v. Whitaker,* 275 Fed. 476, the District Court for the District of Connecticut had under consideration the Public Acts of Connecticut 1921, chapter 77, being an act concerning public service motor vehicles operating over fixed routes,

similar in many respects to the Washington Act involved in this case. Substantially all the objections to the act as being violative of the fourteenth amendment were urged in that case and the court held that the act was not in any respect violative of such amendment. The language of the court is very pertinent to this case:

"We think the several objections urged as to the constitutionality of the act are not well founded. As to the first, the claim is that, because the statute provides that all jitney busses are common carriers and shall be subject to the jurisdiction of the Public Utilities Commission, it discriminates against the plaintiffs. The citizen has the right of travel upon the highways, and may transport his property thereon in the ordinary course of life and business; but this is a very different thing than permitting the highway to be used for commercial purposes, as a place of business, for private gain, in running jitney busses. The right, common to all, to the use of highways, is the ordinary use made thereof; but where, for private gain, a jitney owner wants a special and extraordinary benefit from the highway, to use it for such commercial purpose, the Legislature may, in the exercise of its police powers, wholly deny such use or it may permit it to some and deny it to others, and this is because of the extraordinary nature of such use. And where the Legislature grants the permission to use the highway, it may do so under regulations which are common to all applicants. They may grant, refuse, or revoke the license, and in so doing the Legislature may permit of rules and regulations when such use is granted. This it has done in the act in question, by providing that a body created under the law (the Public Utilities Commission) may make such rules and regulations and grant such license when public convenience and necessity require it.

"It is essential that motor vehicles on the highway used for such purposes should do so with safety to the public, and that owners should contribute to the maintenance of the highways by such payments as may be required with such grant. In examining the act, we are satisfied that it is clear that the Legislature, in comprehensive terms, intended a regulation which is for the interest and convenience of the inhabitants of the localities which are on the proposed route. It left the granting or refusal of a license, and the regulations as to the sanitary conditions and safety of the public, with the Public Utilities Commission, and in conferring this power the Legislature kept well within the confines of its constitutional limitations."

In view of these numerous decisions of the courts it is clear that chapter 111, laws of Washington 1921, is not in any respect a violation of the equal protection clause of the Fourteenth Amendment of the Federal Constitution.

The decision of the lower court in this respect should therefore be affirmed.

IV.

The Department Of Public Works Properly Denied Appellant A Certificate Of Convenience And Necessity.

Appellant alleges in his bill of complaint not only that the statute is violative of the constitution but that the act of the respondent under the statute is also unconstitutional. We have endeavored to show in the preceding portions of this brief that the act itself is in all respects valid. It remains to determine whether or not the action of the Depart-

ment of Public Works, in denying appellant a certificate of convenience and necessity was a proper exercise of the power vested in said department by the statute.

The order of the department in denying said certificate is set forth in full in the case of *In Re Buck,* P. U. R. 1923E, 737. The findings of the department are summarized in detail by the lower court in *Buck v. Kuykendall,* 295 Fed. 197, 204. It is unnecessary to repeat here in any detail the department's findings. It is sufficient to say that an application was made to the department by the appellant for a certificate of convenience and necessity, under the act, for operations between Seattle and Tacoma, Washington, and Portland, Oregon. That a hearing was had before the Department of Public Works at which appellant was represented; that numerous protests against the granting of such certificate were filed with the department and protestants were heard; that the department found that the needs of the public regarding transportation between the points named were fully and adequately served by the three railroads and by the four auto transportation companies, and that there was no necessity for any further transportation between such points and that the appellant was not financially able to furnish such transportation and that the present carriers were ready, able and willing to furnish any additional transportation that public needs might require. The extent of the service now rendered the public for

transportation between these points is set forth in the affidavit of the respondent on pages 32 and 33 of the transcript.

We call the court's attention to the fact that no allegation is made in the bill of complaint that the action of the Department of Public Works in denying the certificate sought was unreasonable, arbitrary, capricious or fraudulent. Since due process of law was afforded by the public hearing before the department with the right of judicial review of the department's order in the Superior and Supreme courts of the state, it is apparent that if the statute itself is valid the act of the department must be accepted as a valid and proper act. In this connection we remind the court that this court and the lower Federal courts have repeatedly stated that findings of an experienced administrative tribunal such as the Department of Public Works, after a full hearing, are entitled to a strong presumption of correctness.

R. R. Commission v. Cumberland Tel. & Tel. Co., 212 U. S. 414, 421, 423, 53 L. Ed. 577, 581;

Darnell v. Edwards, 244 U. S. 564, 569; 61 L. Ed. 1317;

Minneapolis & St. Louis R. Co. v. Minneapolis, ex rel. R. R. & W. Commission, 186 U. S. 257, 264; 46 L. Ed. 1151, 1156;

S. P. Co. v. R. R. Commission, 193 Fed. 699, 703;

Tex. & P. Ry. Co. v. R. R. Commission, 192 Fed. 280, 284;

Louisville & N. R. Company v. R. R. Commission, 208 Fed. 35, 40;

Cumberland Tel. & Tel. Co. v. Louisiana Public Service Commission, 283 Fed. 215, 217.

In view of all these conditions we do not see how the appellant has any right to challenge the validity of the department's action. However, we will discuss some of the allegations of the bill which relate to the merits of the controversy rather than the validity of the statute.

Appellant has applied for a certificate to operate as a common carrier for hire over the Pacific highway between Seattle and Portland. The Pacific highway is paved for the entire distance between these cities and is the main artery for motor vehicles, both private and common carriers. That the department is justified in restricting the use of such highways by automobile busses as common carriers to the actual needs of the traveling public, is clearly shown by the numerous citations heretofore made. The necessity for such regulations is more clearly apparent to the court from an examination of the opening statement of this brief. It will be noted that the travel is very heavy, with corresponding danger to the public and wear and tear on the public highway.

It is alleged in paragraph VII of the amended bill of complaint, that appellant does not intend to and will not stop on said highway to take on or dis-

charge passengers. This would seem to be an attempt to evade the repeated decisions of the courts that he has no inherent right to use the public highways for private business. It is evident, however, that he is using the public highway for business purposes when his motor vehicles are in motion over the highway itself and the fact that he will not use the highway as a terminal station does not take him from under the cases referred to or change the fact that he is attempting to use the public highways for business purposes.

Appellant emphasizes the fact that he desires certificate for through interstate transportation only. Of course his operations would be interstate if he operated from Vancouver, Washington, only, to Portland, and the operation is not made any more interstate in character by extending it to Seattle. The department's order shows that the comfort, and convenience of passengers on a long auto trip like that from Seattle to Portland would necessitate occasional stops and that the present system of operation by the four carriers having certificates, from Seattle to Tacoma, Tacoma to Olympia, Olympia to Kelso and Kelso to Portland, with joint auto depots with adequate rest rooms and facilities for the comfort and convenience of patrons, furnish better service than would be obtained by through transportation.

Appellant emphasizes, in paragraph XII of the bill of complaint, that he contemplates charging a

lower rate than is charged by the present rail and auto transportation companies. This allegation is wholly immaterial to the issues in this case. The present schedule of rates charged by the railroads and auto transportation companies has been in effect for some time and is on file with the Department of Public Works. It is to be presumed that it is reasonable and the statutes provide a means by which, if not reasonable, it may be challenged and its reasonableness determined. The question of the rates charged by the present operators and proposed by the appellant is not involved in this case. The language of the Supreme court of Illinois in the case of *West Suburban Transportation Co. v. Chicago and W. T. Ry. Co.* 140 N.E. 56, 58, in disposing of a jitney case in which the jitney operators had alleged that the fare charged was less than the fare charged by the street railroad company, is as follows:

"Some individuals — perhaps a considerable number — would be convenienced by the operation of the bus lines; but it is clear from the record that to the great body of the public it would be neither a convenience nor necessity. It was not within the authority of the commission to authorize the operation of the bus lines for the convenience of a small part of the public already served by other utilities at no very great inconvenience. The order appealed from stated the bus company proposes to operate its transportation facilities at a lower rate of fare than the public is now paying, and in appellant's brief it says the fare charged is 5 cents; but the order does not fix the rate of fare to be charged. Assuming appellant is limited to a 5 cent fare and appellee is charging a larger rate, that was not, of itself,

sufficient to authorize the order of the commission. The commission had authority to regulate the rate charged by the appellee, and if its fares were excessive to reduce them. Fares are not the only thing to be considered in a case of this kind. The public is interested and vitally concerned in adequate transportation facilities at reasonable rates, and the state is interested in assisting to get them; but the state cannot, as we have said, require a carrier to furnish service at a rate which will not pay a fair return on the investment and cost of operation. We are not advised that any complaint had ever been made to the commission that appellee is charging excessive rates, and so far as this case is concerned we will assume it is not doing so. The effect of authorizing the operation of the bus lines at a lower fare to serve the same territory would be to decrease appellee's revenues, and, if the rate it is now charging is a reasonable one, to require it to operate at a loss or increase its rate. This would be against the public interest, because appellant's lines cannot accommodate more than a comparatively small portion of the public in the matter of transportation."

CONCLUSION.

In the preceding pages we have shown that the provisions of chapter 111, Laws of Washington 1921, as amended by chapter 79, Laws of Washington 1923, are not in contravention of the Federal Aid Act and Federal Highway Act either by an improper restriction upon the use of Federal Aid highways, or by the imposition of tolls for the use thereof. That said act is not in any respect in violation of the commerce clause of the United States Constitution and that said act is a valid exercise of the police power of the state and not in contravention of the fourteenth amendment of the Federal Constitution. It is further shown that the act of the Department of Public Works in denying appellant a certificate was a proper exercise of the authority lawfully conferred upon said department and not in violation of any of the Federal statutes or constitution. We therefore request this court to affirm, in all respects, the decision of the district court.

Respectfully submitted,

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